Supreme Court, U.S.
FILED

No. 95 1455 MAR 11 1996

OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1995

JANET RENO, ATTORNEY GENERAL OF THE UNITED STATES, APPELLANT

v.

BOSSIER PARISH SCHOOL BOARD

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

JURISDICTIONAL STATEMENT

DREW S. DAYS, III
Solicitor General

DEVAL L. PATRICK
Assistant Attorney General

PAUL BENDER
Deputy Solicitor General

CORNELIA T.L. PILLARD
Assistant to the Solicitor General

DAVID K. FLYNN
EILEEN PENNER
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

54 pp

QUESTIONS PRESENTED

1. Whether a district court assessing a covered jurisdiction's purpose under Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c, may disregard factors this Court has held are relevant to proof of discriminatory purpose on the ground that such evidence is also relevant to show vote dilution under Section 2, 42 U.S.C. 1973.

2. Whether the district court clearly erred in finding no discriminatory purpose on the basis of the factors it considered in this case.

3. Whether a voting change that clearly violates Section 2 of the Voting Rights Act is entitled to preclearance under Section 5 of the Act.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statutory and regulatory provisions involved	1
Statement	2
The questions presented are substantial	13
Conclusion	28

TABLE OF AUTHORITIES

Cases:

Arizona v. *Reno*, 887 F. Supp. 318 (D.D.C. 1995), appeal dismissed, No. 95-299 (Mar. 1, 1996)	18
Beer v. *United States*, 425 U.S. 130 (1976)	2, 24
Bob Jones Univ. v. *United States*, 461 U.S. 574 (1983)	26
Brown v. *Board of Educ.*, 347 U.S. 483 (1954)	7
Busbee v. *Smith*, 549 F. Supp. 494 (D.D.C. 1982), aff'd, 459 U.S. 1166 (1983)	15
Chisom v. *Roemer*, 501 U.S. 380 (1991)	25
City of Lockhart v. *United States*, 460 U.S. 125 (1983)	2
City of Mobile v. *Bolden*, 446 U.S. 55 (1980)	3, 13, 15, 25
City of Pleasant Grove v. *United States*:	
568 F. Supp. 1455 (D.D.C. 1983)	15
479 U.S. 462 (1987)	15, 22
City of Port Arthur v. *United States*, 517 F. Supp. 987 (D.D.C. 1981), aff'd, 459 U.S. 159 (1982)	15, 17
City of Rome v. *United States*, 446 U.S. 156 (1980)	2
Columbus Bd. of Educ. v. *Penick*, 443 U.S. 449 (1979)	17

Cases—Continued: Page

EEOC v. *Ethan Allen, Inc.*, 44 F.3d 116 (2d Cir. 1994) 22
Lemon v. *Bossier Parish School Bd.*, 240 F. Supp. 709 (W.D. La. 1965), aff'd, 370 F.2d 847 (5th Cir.), cert. denied, 388 U.S. 911 (1967) 7
Louisiana v. *United States*, 380 U.S. 145 (1965) 7
Major v. *Treen*, 574 F. Supp. 325 (E.D. La. 1983) 7
Miller v. *Johnson*, 115 S. Ct. 2475 (1995) 2, 18, 19
Personnel Administrator v. *Feeney*, 442 U.S. 256 (1979) 16, 17
Pullman-Standard v. *Swint*, 456 U.S. 273 (1982) 16, 19
Rogers v. *Lodge*, 458 U.S. 613 (1982) 13, 15, 16, 17
St. Mary's Honor Center v. *Hicks*, 113 S. Ct. 2742 (1993) 22
Shaw v. *Reno*, 113 S. Ct. 2816 (1993) 22
South Carolina v. *Katzenbach*, 383 U.S. 301 (1966) 14
Southwest Merchandising Corp. v. *NLRB*, 53 F.3d 1334 (D.C. Cir. 1995) 22
Thornburg v. *Gingles*, 478 U.S. 30 (1986) 3, 24, 25
Village of Arlington Heights v. *Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977) 13, 14, 15, 16, 17, 21
Washington v. *Davis*, 426 U.S. 229 (1976) 16
White v. *Regester*, 412 U.S. 755 (1973) 25

Constitution, statutes and regulations:

U.S. Const.:
Amend. XIII 6
Amend. XIV (Equal Protection Clause) 3
Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 3, 96 Stat. 134 3
Voting Rights Act of 1965, 42 U.S.C. 1973 *et seq.*:
§ 2, 42 U.S.C. 1973 ..... *passim*
§ 2(a), 42 U.S.C. 1973(a) 3, 25
§ 2(b), 42 U.S.C. 1973(b) 3, 25
§ 4, 42 U.S.C. 1973b 2, 3
§ 4(a)(8), 42 U.S.C. 1973b(a)(8) 25
§ 5, 42 U.S.C. 1973c ..... *passim*

Statutes and regulations—Continued: Page

42 U.S.C. 1971(c) 14
28 C.F.R. Pt. 51 4
Section 51.2 2
Section 51.13(e) 2
Section 51.54(a) 4
Section 51.55(a) 4
Section 51.55(b)(2) 2, 5, 12, 14, 23, 25
Section 51.56(c)(1) 4, 26
Sections 51.57-51.61 3
Section 51.58(b)(1) 3
Section 51.58(b)(4) 3
App. 3

Miscellaneous:

50 Fed. Reg. (1985):
p. 19,122 ..... 3, 4, 26
p. 19,131 ..... 4, 26
Proposed Changes to Regulations Governing Section 5 of the Voting Rights Act: Oversight Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 99th Cong., 1st Sess. (1985) 26
S. Rep. No. 417, 97th Cong., 2d Sess. (1982) 3, 4, 23, 24, 25
Subcommittee on Civil and Constitutional Rights of the House Comm. on the Judiciary, 99th Cong., 2d Sess., *Voting Rights Act: Proposed Section 5 Regulations* (Comm. Print 1986 Ser. No. 9) 4

In the Supreme Court of the United States

OCTOBER TERM, 1995

No.

JANET RENO, ATTORNEY GENERAL OF THE UNITED STATES, APPELLANT

v.

BOSSIER PARISH SCHOOL BOARD

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the three-judge district court (App. 1a-65a) is reported at 907 F. Supp. 434.

JURISDICTION

The judgment of the three-judge district court was entered on November 2, 1995. A notice of appeal was filed on December 27, 1995. App. 163a-164a. On February 22, 1996, the Chief Justice extended the time within which to file a jurisdictional statement to and including March 11, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1253 and 42 U.S.C. 1973c.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The relevant statutory provisions are Sections 2 and 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973, 1973c,

which are reproduced in an appendix to this jurisdictional statement. App. 165a-167a. This case also involves a provision of the Procedures for the Administration of Section 5, 28 C.F.R. 51.55(b)(2), which is reproduced in the appendix. App. 168a.

STATEMENT

1. Congress enacted the Voting Rights Act of 1965 in order to eliminate discrimination in voting. Section 5 of the Act, 42 U.S.C. 1973c, provides that a covered jurisdiction may not implement any change in election practices unless it has first obtained a declaratory judgment from the United States District Court for the District of Columbia that the change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color." Alternatively, the change may be enforced if, within 60 days after its submission to her, the Attorney General has interposed no objection to it. A covered jurisdiction seeking preclearance of a voting change under Section 5 must show both (1) an absence of discriminatory purpose in the adoption of the change, and (2) that the change will not have a discriminatory effect. *City of Rome* v. *United States*, 446 U.S. 156, 172-173 (1980).[1] There is no dispute that the Bossier Parish School Board redistricting plan involved in this case is a change in an election practice covered by Section 5. See App. 140a-141a (¶¶ 249, 251).[2]

[1] This Court has interpreted the discriminatory effect standard in Section 5 to require a showing of non-retrogression, *i.e.*, that the proposed change will not diminish the ability of members of racial minorities to elect representatives of their choice. *Miller* v. *Johnson*, 115 S. Ct. 2475, 2483 (1995); *City of Lockhart* v. *United States*, 460 U.S. 125, 134 (1983); *Beer* v. *United States*, 425 U.S. 130, 141 (1976).

[2] Covered changes include redistricting. *Miller*, 115 S. Ct. at 2483; 28 C.F.R. 51.2, 51.13(e). The State of Louisiana, and all of its political subdivisions, are covered jurisdictions under Section 4 of the Act, 42 U.S.C. 1973b, and are therefore subject to the preclearance requirements of Section 5. See 28 C.F.R. Pt. 51, App.

The Department of Justice regulations establishing procedures for the administration of Section 5 set forth relevant factors to guide the Attorney General's determinations under Section 5. See generally 28 C.F.R. 51.57-51.61. Those factors include, *inter alia*, "[t]he extent to which minorities have been denied an equal opportunity to participate meaningfully in the political process in the jurisdiction," 28 C.F.R. 51.58(b)(1), and the extent to which "present or past discrimination" affected "the voter registration and election participation of minority voters," 28 C.F.R. 51.58(b)(4). Those provisions are designed to "follow[] the law as interpreted by the Supreme Court of the United States and other courts." 50 Fed. Reg. 19,122 (1985).

Section 2 of the Act, as amended in 1982, 42 U.S.C. 1973, prohibits any voting practice "which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color," 42 U.S.C. 1973(a). A Section 2 plaintiff may challenge a voting practice on the ground that it has the discriminatory effect of denying minority citizens an equal opportunity to participate in the electoral process and to elect representatives of their choice; no discriminatory purpose on the part of the challenged jurisdiction need be shown. 42 U.S.C. 1973(b).[3]

When the Voting Rights Act was amended in 1982, the Senate Judiciary Committee Report stated that a vio-

[3] Section 2 was amended in 1982, Pub. L. No. 97-205, § 3, 96 Stat. 134, in response to *City of Mobile* v. *Bolden*, 446 U.S. 55 (1980), which had held that a violation of either Section 2 or the Equal Protection Clause required a showing of discriminatory purpose in the adoption or maintenance of the contested electoral practice. The 1982 amendment made clear that no showing of discriminatory purpose is required under Section 2. S. Rep. No. 417, 97th Cong., 2d Sess. 15-16, 22 (1982); *Thornburg* v. *Gingles*, 478 U.S. 30, 35 (1986).

lation of amended Section 2 should prevent preclearance under Section 5: "In light of the amendment to section 2, it is intended that a section 5 objection also follow if a new voting procedure itself so discriminates as to violate section 2." S. Rep. No. 417, 97th Cong., 2d Sess. 12 n.31 (1982).

In 1985, the Department of Justice drafted a regulation requiring denial of preclearance under Section 5 to voting changes that violate Section 2. 50 Fed. Reg. 19,122, 19,131. That proposed regulation (proposed 28 C.F.R. 51.56(c)(1)) stated that the Attorney General would object under Section 5 "based upon violation of Section 2." Congress then initiated oversight hearings to decide, *inter alia*, whether the 1982 amendments "supported the incorporation of Section 2 standards into Section 5." Subcommittee on Civil and Constitutional Rights of the House Comm. on the Judiciary, 99th Cong., 2d Sess., *Voting Rights Act: Proposed Section 5 Regulations* 1 (Comm. Print 1986 Ser. No. 9) [hereinafter *Comm. Print*]. Following the oversight hearings, the Subcommittee approved the Department's interpretation of Section 5:

> [T]he Subcommittee concludes that it is a proper interpretation of the legislative history of the 1982 amendments to use Section 2 standards in the course of making Section 5 determinations.

Comm. Print 5.

In 1987, the Department of Justice adopted the regulation in essentially the form in which it had been proposed, with the modification that the Attorney General's denial of preclearance should be based only on a "clear" violation of Section 2. The regulations establishing procedures for the administration of Section 5, 28 C.F.R. Pt. 51, thus provide that a change may not be precleared, not only if it was adopted with a discriminatory purpose or if it would have a retrogressive effect, 28 C.F.R. 51.54(a), 51.55(a), but also if "a bar to implementation

of the change is necessary to prevent a clear violation of amended section 2." 28 C.F.R. 51.55(b)(2).

2. a. This case involves preclearance of the redistricting plan for the Bossier Parish School Board (Board). The 12-member Board governs the Bossier Parish School District, which is coterminous with Bossier Parish. App. 3a-4a. The Board is elected from single-member districts for four-year concurrent terms. A majority-vote requirement applies to elections of Board members. *Id.* at 4a. The Board redistricted following the 1990 census to eliminate population malapportionment among its existing districts.

In 1990, blacks comprised 20.1% of the total population of Bossier Parish, and 17.6% of the voting age population. App. 2a. As of 1994, blacks comprised 15.5% of Bossier Parish's registered voters. *Ibid.* The black population of the parish is concentrated in two areas: More than 50% of the black residents live in Bossier City, *id.* at 68a (¶ 10), and the remaining black population is concentrated in the northern rural portion of the parish, *id.* at 2a, 68a (¶ 10). The parties have stipulated to facts showing that voting in the parish is racially polarized, *id.* at 40a, 122a-127a (¶¶ 181-196), and that "voting patterns in Bossier Parish are affected by racial preferences," *id.* at 122a (¶ 181).

No black person has ever been elected to the Board. App. 4a, 115a (¶ 153). Despite the facts that the Board has 12 members, blacks comprise one-fifth of the parish population, and the parish's black population is concentrated in two areas, the Board's 1992 redistricting plan includes no majority-black districts. *Id.* at 8a, 68a (¶ 11), 102a (¶ 109). The Board adopted that plan even though it has admitted that it was "obvious" during the redistricting process "that a reasonably compact black-majority district could be drawn within Bossier City." *Id.* at 76a (¶ 36). The outlines of a second, reasonably compact majority-black district in the rural, northern area

of the parish were also "readily discernible" from information then before the Board. *Id.* at 114a (¶ 148).

Black voters historically have been unable to elect candidates of their choice to other political positions in Bossier Parish. App. 118a-127a (¶¶ 153-196). Of the 14 elections in the parish since 1980 in which a black candidate has run against a white candidate in a single-member district or for mayor, only two black candidates have won. *Id.* at 127a (¶ 196). One was a candidate for the Bossier Parish Police Jury,[4] and the other for the Bossier City Council. *Ibid.* The black Police Juror won in Police Jury District 10, which contained a United States Air Force base, *id.* at 117a (¶¶ 160-161), and the black City Council member won in a city council district that substantially overlapped Police Jury District 10, and also included the Air Force base, *id.* at 120a (¶ 172). The district court found that the base is a factor unique to those districts that increased the ability of black voters in that area to elect representatives of their choice. *Id.* at 2a n.1.[5]

Bossier Parish and its School Board have a history of racial discrimination beginning before the Civil War and continuing to the present. See generally App. 42a-46a.

[4] The Policy Jury is the governing body for the parish. See page 8, *infra*.

[5] Many residents in and around the base do not vote in local elections, App. 117a-118a (¶¶ 160-163); that factor, together with the tendency of Air Force retirees who settle in the area to vote in a less racially polarized way than other Bossier Parish residents, increases the ability of black voters in the districts containing the Air Force base to elect representatives of their choice. *Id.* at 117a-118a (¶¶ 162-163), 127a (¶ 196). In the reconfigured plan adopted by the Police Jury in 1991 and the City Council in 1993, the Air Force base no longer has that effect. *Id.* at 2a n.1. The black incumbent Police Juror was reelected in 1991 in the redrawn district in an election in which he ran unopposed. *Ibid.* The black incumbent city council member ran against a white opponent and lost. *Id.* at 120a (¶ 173).

130a-140a (¶¶ 214-248).[6] De jure segregation prevailed in Louisiana's schools long after *Brown* v. *Board of Educ.*, 347 U.S. 483 (1954). App. 136a (¶ 235). The Board has repeatedly sought to evade its desegregation obligations. *Id.* at 136a-137a (¶¶ 237-239). It remains under court order to remedy the vestiges of discrimination in its school system. See *Lemon* v. *Bossier Parish School Bd.*, 240 F. Supp. 709 (W.D. La. 1965), aff'd, 370 F.2d 847 (5th Cir.), cert. denied, 388 U.S. 911 (1967). Since 1980, the schools in Bossier Parish have become increasingly segregated by race. *Id.* at 137a-138a (¶¶ 240-242). The Board has nevertheless violated the *Lemon* court's order that it maintain a biracial committee to improve education and recommend ways to attain and maintain a unitary school system. *Id.* at 103a-104a (¶¶ 111-112).[7] The effects of past discrimination continue today:

[6] Many decades of discriminatory government action in Louisiana resulted in the large-scale disenfranchisement of black voters. Following the passage of the Thirteenth Amendment, Louisiana enacted laws intended to reduce black voting; black registration decreased by 90% within a few years. App. 130a-131a (¶¶ 215-219). In 1921, an amendment to the State Constitution required persons seeking to register to vote to "give a reasonable interpretation" of a constitutional provision. *Id.* at 132a (¶ 221). That amendment, which disenfranchised most black citizens, was not invalidated until 1965. *Louisiana* v. *United States*, 380 U.S. 145 (1965). After an all-white Louisiana Democratic primary was invalidated, the party adopted an anti-single-shot law and a majority-vote requirement for party office. App. 132a (¶ 222); *Major* v. *Treen*, 574 F. Supp. 325, 341 (E.D. La. 1983).

[7] The biracial committee met in 1976, when it was first convened, but only the black members attended the few meetings that were held, and the committee was then discontinued. App. 103a-104a (¶¶ 111-112). A similar committee was formed in 1993, shortly after the School Board submitted its redistricting plan to the Justice Department for Section 5 review. The Board promptly disbanded that committee also because, according to the School Board President, the minority members of the committee "quickly turned toward becoming involved in policy." *Id.* at 104a-105a (¶¶ 113-116).

"Black citizens of Bossier Parish suffer a markedly lower socioeconomic status than their white counterparts" that is "traceable to a legacy of racial discrimination affecting Bossier Parish's black citizens." *Id.* at 128a (¶ 200); see generally *id.* at 127a-130a (¶¶ 197-213). This "makes it harder for blacks to obtain necessary electoral information, organize, raise funds, campaign, register, and turn out to vote, and this in turn causes a depressed level of political participation for black persons within Bossier Parish." *Id.* at 130a (¶ 213).

b. Following the 1990 census, redistricting efforts by the Bossier Parish Police Jury preceded the School Board redistricting. The Police Jury, like the School Board, consists of 12 members, who are elected from single-member districts in the same manner as the Board. App. 2a. The Police Jury has never had a districting plan that contained any majority-black districts, *ibid.*, and the plan the Police Jury adopted in April, 1991, also contains none, *id.* at 3a, 68a (¶ 11).

During the 1990-1991 redistricting process, the white Police Jurors and their demographer knew, just as the School Board knew during its subsequent redistricting process, that it was feasible to create two reasonably compact majority-black districts in the parish. App. 76a (¶ 36), 82a-83a (¶ 53), 114a (¶ 148). Police Jurors nonetheless told citizens who advocated creating majority-black districts that it was impossible to create such districts because the black population was too dispersed. *Id.* at 3a, 83a (¶ 54); see also *id.* at 82a (¶ 52).

On May 28, 1991, the Police Jury submitted its redistricting plan to the Attorney General seeking preclearance under Section 5. The Police Jury did not provide the Attorney General with the information that showed that reasonably compact majority-black districts could be created. App. 68a-69a (¶ 11). On July 29, based on the information submitted, the Attorney General precleared the redistricting plan for the Police Jury elections. *Id.* at 3a, 68a-69a (¶ 11).

c. The School Board began its own redistricting process in early 1991. App. 4a. With its next election not scheduled to occur until October, 1994, the Board proceeded without urgency. *Id.* at 4a, 93a (¶ 83). The Board initially chose not to use the districts in the 1991 Police Jury plan, but to develop a separate plan for the Board. *Id.* at 4a, 28a, 47a, 94a (¶ 87). Although the Board and the Police Jury have jurisdiction over the same geographic area, are the same size, and both use 12 single-member districts, the bodies serve different functions and for at least a decade have maintained different electoral districts. *Id.* at 3a-4a & n.3, 72a-73a (¶¶ 24, 26). Schools are unevenly distributed in the Police Jury districts, with some districts containing no schools and others containing several, and Police Jury district lines do not correspond with school attendance zones. *Id.* at 8a, 72a-73a (¶ 24), 112a (¶ 141). Board members also did not like the 1991 Police Jury plan because it would pit Board incumbents against each other in two districts. *Id.* at 8a. The Board hired the Police Jury's demographer to develop a new redistricting plan for the Board, estimating that he would spend 200 to 250 hours on the project. *Id.* at 92a (¶ 80), 94a (¶ 86). The demographer met privately with Board members and showed them various computer-generated alternative districts. *Id.* at 97a (¶ 96).

Beginning in March, 1992, representatives of local black community groups (including defendant-intervenor George Price, president of the NAACP local chapter) requested that representatives of the black community be included in the Board's redistricting process. The Board failed to respond to those requests. App. 5a, 96a-98a (¶¶ 93-94, 97). Some Board members privately stated that the Board was "hostile to black representation on the School Board." *Id.* at 30a-32a, 53a-54a. In August, 1992, with no other plan publicly on the table, Price presented a plan for two majority-black districts that had been developed by the NAACP. *Id.* at 6a, 96a-97a (¶ 95), 98a (¶¶ 98-99).

Price was told that the Board would not consider a plan that did not also draw the other ten districts. *Id.* at 6a, 98a (¶ 99).

At the September 3, 1992, Board meeting, Price presented an NAACP plan depicting all 12 districts, but the Board refused to consider it, ostensibly because "the plan's district lines crossed existing precinct lines, and therefore violated state law." App. 99a (¶ 102); *id* at 6a.[8] The Board knew at the time, however, that it was legal and feasible to draw districts across existing precinct lines.[9] Indeed, in considering creating a new plan, the Board itself had anticipated the necessity of splitting precincts. *Id.* at 29a, 95a (¶ 89).

The Board did not ask its demographer to explore the possibility of alleviating black vote dilution. App. 101a (¶ 106). Instead, at its September 17, 1992, meeting, without studying the NAACP proposal and with two years left before the next Board election, the Board unanimously passed a motion of intent to adopt the Police Jury plan which it had initially found unsatisfactory. *Id.* at 100a (¶ 106). At a public hearing the next week, 15 residents voiced their opposition to adoption of the Police Jury plan, principally on the ground that it would dilute black voting strength; no one spoke in favor of that plan.

---

[8] Election precincts are administrative units established for the purpose of conducting elections, including siting polling booths and allocating election officials. See generally Corrected United States' and Defendants-Intervenors, Proposed Post-Trial Findings of Fact, 12-13 (¶ 18).

[9] The Board knew that it was "free to request precinct changes from the Policy Jury necessary to accomplish [its] redistricting plans," App. 7a (quoting *id.* at 72a (¶ 23)); *id.* at 99a-100a (¶ 102)—a practice that was "quite common" state-wide. *Id.* at 22a (¶ 22). There was no discussion at the time of any need to minimize the number of precinct splits or the costs of required splits. See generally U.S. Exhs, 26-28, 32, 34 (Board minutes); Exh. 102 ¶¶ 9, 10 (testimony of Jerome Blunt).

Id. at 7a-8a, 101a (¶ 108). The NAACP presented a petition containing over 500 signatures opposing adoption of the Police Jury plan, and asking the Board to consider an alternative. *Id.* at 7a-8a, 101a-102a (¶ 108). The Board adopted the Police Jury plan at its next meeting. *Id.* at 8a, 102a (¶ 109).

The Board submitted the Police Jury plan to the Attorney General for preclearance. On August 30, 1993, the Attorney General objected to the plan under Section 5 of the Voting Rights Act, citing information showing the clear dilutive effect of the plan on minority voting strength. Such information had not been provided when the Police Jury submitted the same plan in 1991. App. 8a, 106a (¶ 119), 154a-158a.

3. On July 8, 1994, the Board filed a declaratory judgment action seeking Section 5 preclearance from a three-judge district court for the District of Columbia. On November 2, 1995, following a two-day trial, the district court granted preclearance. App. 1a-65a.

The court first held that Section 5 preclearance cannot be denied based upon a violation of Section 2. App. 11a-12a. The court reasoned that Section 2 "uses plainly different language and serves a different function from that of section 5." *Id.* at 15a. The court noted that the discriminatory effects addressed by Section 5 are limited to retrogressive effects, whereas Section 2's "result" standard "can be violated * * * irrespective of whether the disputed voting practice is better or worse than whatever it is meant to replace." *Ibid.* The court did not address the United States' alternative argument that a Section 2 violation is an independent basis for denying Section 5 preclearance, *i.e.*, an affirmative defense, on which the United States bears the burden of proof. See U.S. Post-Trial Br. 32 n.27.

The district court concluded that the legislative history of the Act did not support denial of preclearance based on a Section 2 violation. In its view, resort to the legis-

lative history was inappropriate because the language of the statute is "unambiguous." App. 17a. The court also refused to accord any deference to the Department of Justice regulation requiring the Attorney General to withhold preclearance of voting changes that clearly violate Section 2, 28 C.F.R. 51.55(b)(2), on the ground that preclearance does not depend on administrative proceedings, but may be obtained from a federal court in the first instance. App. 18a-19a.

The district court then held that the Board, in adopting the Police Jury plan, did not have a racially discriminatory purpose that would bar preclearance. App. 27a-29a. In deciding that question, the court held that "evidence of a section 2 violation" should not be considered as "evidence of discriminatory purpose under section 5." *Id.* at 23a. The court thus refused to consider, as relevant to the Board's purpose, the Board's contemporaneous awareness that the Police Jury plan precluded any meaningful opportunity for blacks to elect representatives of their choice. The district court also refused to consider evidence that the Board had a history of racial discrimination, including continuing noncompliance with the terms of the court order in the two-decade-old school desegregation case. *Id.* at 34a n.18. The district court noted that the Board "offered several reasons for its adoption of the Police Jury plan that clearly were not real reasons." *Id.* at 27a & n.15. It nonetheless found "legitimate, nondiscriminatory motives" for the Board's adoption of the Police Jury plan: "The Police Jury plan offered the twin attractions of guaranteed preclearance and easy implementation (because no precinct lines would need redrawing)." *Id.* at 27a-28a.

Judge Kessler concurred in part and dissented in part. App. 37a-65a. She agreed with the majority that a Section 2 violation does not prevent Section 5 preclearance, *id.* at 37a, but dissented from the majority's conclusion that the Board acted with legitimate, nondiscriminatory motives,

id. at 38a-65a. Taking into account evidence that she believed was clearly relevant under *Village of Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 266 (1977), and that the majority incorrectly ignored, Judge Kessler found that "the evidence demonstrates conclusively that the Bossier School Board acted with discriminatory purpose." App. 39a.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

The decision of the district court seriously undermines enforcement of Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c, as amended in 1982. The court applied the wrong standard for deciding whether Bossier Parish redistricted with a discriminatory purpose. It concluded that evidence that this Court consistently has held to be relevant to proving discriminatory purpose—including evidence of a history of discrimination by the jurisdiction, evidence of the proposed redistricting plan's dilutive effect on minority representation, and other relevant evidence—should not be considered in assessing purpose under Section 5. The court based that holding on its observation that such evidence would also be relevant in a Section 2 case alleging unlawful vote dilution. App. 23a. By thus arbitrarily excluding probative evidence of purpose, the district court seriously impairs the effectiveness of Section 5 in preventing implementation of voting changes adopted with a discriminatory purpose. The court's restriction on the Section 5 purpose inquiry also squarely conflicts with established law regarding proof of purpose in discrimination litigation. *E.g.*, *Rogers* v. *Lodge*, 458 U.S. 613, 623-624 (1982); *City of Mobile* v. *Bolden*, 446 U.S. 55, 70 (1980) (opinion of Stewart, J.) (citing *Village of Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 266 (1977)).

The district court also erred in holding that preclearance may not be denied on the ground that the proposed vot-

ing change violates Section 2 of the Act, 42 U.S.C. 1973. The court thereby effectively invalidated the Department of Justice regulation requiring denial of preclearance when a clear violation of Section 2 is established. 28 C.F.R. 51.55(b)(2). The validity of that regulation presents an important question: Since 1985, when Section 51.55(b)(2) was adopted, the Attorney General has on more than 40 occasions interposed Section 5 objections based in whole or in part on clear Section 2 violations. Section 51.55(b)(2) implements Congress's amendment of the Voting Rights Act in 1982, and it was specifically approved by the House Subcommittee on Civil and Constitutional Rights following oversight hearings in 1985. The district court's holding, in contrast, impedes use of Section 5 as Congress intended, to "shift the advantage of time and inertia from the perpetrators of the evil to its victims." *South Carolina* v. *Katzenbach*, 383 U.S. 301, 328 (1966). Under the district court's decision, clearly dilutive voting practices must be precleared under Section 5. Minority voters (or the Attorney General, see 42 U.S.C. 1971(c)) would thus be left to initiate litigation, resubmit evidence to prove a Section 2 violation that was already manifest in the Section 5 proceeding, and suffer clearly unlawful discrimination in the interim.

Because the District Court for the District of Columbia has exclusive jurisdiction over Section 5 declaratory judgment actions, and appeal lies only to this Court, 42 U.S.C. 1973c, the important federal questions presented by this case warrant this Court's attention.

1. a. The district court erred as a matter of law in failing to consider evidence directly relevant to the question of discriminatory purpose: the Board's awareness of the dilutive effect of the Police Jury plan on minority voting strength and the Board's historical and ongoing discrimination. In refusing to consider this evidence as bearing on purpose, the district court failed to follow the approach established by *Arlington Heights*, 429 U.S. at

266. Instead, it expressly and repeatedly articulated an erroneous standard, holding that what it characterized as "section 2 evidence"—evidence that would be relevant in a Section 2 vote dilution proceeding—could not also be used in determining purpose under Section 5.[10] The district court's refusal to consider important, relevant evidence led it incorrectly to find that the Board had no discriminatory purpose. That refusal also infected the findings of fact the court made in support of its determination that the Board had nondiscriminatory reasons for adopting its plan.[11]

The district court's refusal to consider evidence of the effect of the Board's redistricting plan in diluting minority voting strength is squarely contrary to this Court's settled approach to determining racially discriminatory purpose. In the voting rights context, evidence of the impact of a disputed decision is "an important starting point" for an inquiry into purpose. *Bolden*, 446 U.S. at 70 (citing *Arlington Heights*, 429 U.S. at 266); see *Rogers*, 458 U.S. at 623-624.[12] Discrimination cases arising in other

---

[10] App. 24a ("we will not permit section 2 evidence to prove discriminatory purpose under section 5"); see *id.* at 23a ("*Miller* [v. *Johnson*, 115 S. Ct. 2475 (1995)] forecloses the permitting of section 2 evidence in a section 5 case"); *ibid.* (refusing to "consider evidence of a section 2 violation as evidence of discriminatory purpose under section 5").

[11] Moreover, the district court's decision must be reversed even if this Court believes that the Board may have been motivated only in part by a discriminatory purpose. See *City of Pleasant Grove* v. *United States*, 479 U.S. 462, 471-472 (1987) (affirming finding of impermissible purpose where plan was motivated "in part" by discrimination).

[12] This Court has affirmed several three-judge district court decisions endorsing the application of *Arlington Heights* to Section 5's purpose prong. See *Busbee* v. *Smith*, 549 F. Supp. 494, 516-517 (D.D.C. 1982), aff'd, 459 U.S. 1166 (1983); *City of Port Arthur* v. *United States*, 517 F. Supp. 987, 1019 (D.D.C. 1981), aff'd, 459 U.S. 159 (1982); *City of Pleasant Grove* v. *United States*, 568 F. Supp. 1455, 1458 (D.D.C. 1983).

contexts also require consideration of the impact of the disputed practice as part of the assessment of purpose. See, *e.g.*, *Pullman-Standard* v. *Swint*, 456 U.S. 273, 289 & n.18 (1982); *Personnel Administrator* v. *Feeney*, 442 U.S. 256, 274-275 (1979). Racially discriminatory purpose is most often proved by circumstantial evidence; in considering whether such a purpose is present, a court must examine the "totality of the relevant facts, including the fact, if it is true, that the [challenged practice] bears more heavily on one race than another." *Washington* v. *Davis*, 426 U.S. 229, 242 (1976).

Although evidence that a voting practice substantially dilutes minority voting strength ordinarily does not itself demonstrate the presence of a discriminatory purpose, it is certainly relevant in making that determination. This is especially true where, as here, the discriminatory effect of the practice was known to the Board at the time the practice was adopted. This Court held in *Rogers* that "overwhelming evidence of bloc voting along racial lines," and the fact that "no black had ever been elected" to the legislative body in question "bear heavily on the issue of purposeful discrimination." 458 U.S. at 623. The district court here therefore erred in refusing to consider, as relevant to the Board's purpose, the substantial, largely undisputed evidence we presented demonstrating that the Board's plan was adopted with knowledge that it would lead to minority vote dilution. See *id.* at 623-627.[13]

[13] The Board admitted that it was "obvious that a reasonably compact black-majority district could be drawn within Bossier City," App. 76a (¶ 36), and that the outlines of a compact northern majority-black district were readily discernible from the plan the NAACP submitted to the Board, *id.* at 114a (¶ 148). Undisputed evidence established that blacks comprised a significant proportion of voters in Bossier Parish. *Id.* at 2a. "There was * * * overwhelming evidence of bloc voting along racial lines" and, "although there had been black candidates, no black had ever been elected" to the Bossier Parish School Board. *Rogers*, 458 U.S. at 623; App. 40a, 115a-127a (¶¶ 153-196). But "rather than consider either of the alternative proposals [that included majority-black districts] brought before it or direct their own cartographer to draft one, the School Board adopted a plan 'which guaranteed that blacks would remain underrepresented on the [Board] by comparison to their numerical strength in the enlarged community.'" *Id.* at 41a (quoting *City of Port Arthur*, 517 F. Supp. at 1022). Such "actions having foreseeable and anticipated disparate impact are relevant evidence to prove the ultimate fact, forbidden purpose." *Columbus Bd. of Educ.* v. *Penick*, 443 U.S. 449, 464 (1979); see also *Feeney*, 442 U.S. at 279 n.25.

The district court also failed to take into account other relevant purpose evidence solely because such evidence would also be relevant in a Section 2 proceeding. The court, for example, did not consider the Board's substantial and continuing legacy of discrimination against blacks. Compare App. 34a n.18 with 42a-46a, 136a-138a (¶¶ 236-243). This Court has held that "[e]vidence of historical discrimination is relevant to drawing an inference of purposeful discrimination." *Rogers*, 458 U.S. at 625; accord *Arlington Heights*, 429 U.S. at 267. In addition, the fact that "some [parish] schools still remain essentially segregated" buttresses the United States' contention that the Board adopted this dilutive voting system for a discriminatory purpose. *Rogers*, 458 U.S. at 624-625. The Board's recent disbandment of a biracial committee in violation of a court desegregation order because "the tone of the committee made up of the minority members * * * quickly turned toward becoming involved in policy," App. 105a (¶ 116), also reflected the Board's historic preference to avoid minority participation.[14] The district court should also have taken into account the fact that the Board has been unresponsive to reasonable concerns of the black community; that is an "important element * * * of [the] number of circumstances a court should consider in determining whether discriminatory purpose may be inferred." *Rogers*, 458 U.S. at 626 n.9.

[14] As Judge Kessler noted, "[w]hat exactly the Committee was supposed to become involved in, if not policy, is unclear." App. 46a.

b. Contrary to the district court's suggestion, App. 23a, acknowledging the relevance of evidence of the discriminatory effect of a voting practice is not equivalent to holding that Section 5 preclearance can be denied based solely upon a violation of Section 2. We do not contend that evidence that would show illegal vote dilution, or evidence of a history of discrimination, *by itself* amounts to proof of discriminatory purpose. Such evidence, however, is indisputably *relevant* to the purpose inquiry. See pages 15-17, *supra*; *Arizona* v. *Reno*, 887 F. Supp. 318, 323-324 (D.D.C. 1995) (evidence relevant to Section 2 violation also relevant to Section 5 inquiry), appeal dismissed, No. 95-299 (Mar. 1, 1996).

The district court also incorrectly equated the United States' argument that the Board's adoption of a plan that it knew diluted minority voting strength indicated its discriminatory purpose with the purpose argument the Court rejected in *Miller* v. *Johnson*, 115 S. Ct. 2475 (1995). App. 34a-36a. In the portion of *Miller* on which the district court relies, *id.* at 23a-24a (citing *Miller*, 115 S. Ct. at 2492-2493), the Court held only that purposeful refusal to subordinate traditional districting principles in order to "maximize" the number of majority-black districts fails to demonstrate purposeful discrimination. Here, in contrast, the United States points not to a failure to "maximize" majority-black districts, but to the Board's adoption of a plan without even a single majority-black district. The Board's awareness of the plan's discriminatory effect is clearly relevant to the existence of discriminatory purpose.[15]

[15] The Court in *Miller* did not refuse to consider evidence relevant to discriminatory purpose. Indeed, in evaluating whether the plan before it was adopted with a discriminatory purpose, the *Miller* Court considered the ameliorative impact of the plan before it. 115 S. Ct. at 2492. *Miller* is thus fully consistent with the substantial precedent mandating consideration of the effect of a decision as one element in the totality of circumstances that indicates whether the decision was purposefully discriminatory. Indeed, throughout its *Miller* opinion, the Court cited *Arlington Heights* with approval. *Miller*, 115 S. Ct. at 2483, 2487, 2489.

c. The totality of the evidence thus must be reevaluated in view of the facts the court incorrectly ignored. Reversal is required "unless the record permits only one resolution of the factual issue" consistent with the finding below. *Swint*, 456 U.S. at 292. The only conclusion the record here supports is precisely the opposite of the one the district court reached; thus, at a minimum, a remand is required. In this case, as in *Swint*, the district court "failed to consider relevant evidence" and certainly "might have come to a different conclusion had it considered that evidence." *Ibid.*

When the facts the district court disregarded are considered together with the other relevant evidence in this case, it is clear that the district court might have come to a different conclusion had it not made its legal errors. We have already indicated the relevance to the purpose determination of the undisputed evidence that the Police Jury plan diluted the opportunity of minorities to elect representatives of their choice, that the Board had a history of racial discrimination, and other facts relevant to purpose the district court ignored. Pages 15-18 & n.13, *supra*. The district court's erroneous refusal to consider that evidence also likely caused it to evaluate improperly the limited evidence it did consider as bearing on purpose.

Thus, when the dilutive effect of the Board's plan is taken into account, Board members' statements of opposition to "black representation" on the Board clearly do, contrary to the district court's conclusion, indicate a purpose to prevent "the presence of black persons as members of the School Board." App. 31a.[16] Similarly,

[16] The district court reasoned that the opposition to "the intentional drawing of majority-black districts in order to ensure black representation on the Board" was "hardly an indication of discriminatory purpose unless section 5 imposes an affirmative obligation

the district court's conclusion (*id.* at 28a) that avoiding controversy was a legitimate and nondiscriminatory reason for adoption of the Police Jury plan was dependent on the court's erroneous decision completely to ignore vote dilution. The only controversy the School Board faced at the time was black citizens' opposition to the strongly dilutive effect of any plan with exclusively majority-white districts.[17] The district court also saw the Board's appointment of a black member to a vacant School Board post as indicative of the Board's lack of opposition to black representation, and thus as evidence of the lack of a discriminatory purpose. *Id.* at 30a. But that appointment was plainly a meaningless palliative. When the evidence of racially polarized bloc voting is taken into account, along with the fact that all the plan's districts are majority-white, it is clear that the black appointee's service was virtually certain to end—as it in fact did end—in six months, when the appointed black Board member faced an election challenge by a white in an overwhelmingly white district.

2. The district court concluded, on the basis of the evidence it did consider, that the Board had non-racially

---

to draw additional majority-black districts." App. 31a. If Section 5 alone imposes no such obligation, it remains relevant that, in certain circumstances, Section 2 does. When elected officials engaged in redistricting explain that they drew all majority-white districts to resist the correct operation of Section 2 in the circumstances before them, such an explanation is not, contrary to the district court's finding, an "entirely legitimate reason[]" for the disputed plan, *id.* at 31a, but is strongly indicative of discriminatory purpose.

[17] The proposal to adopt the Policy Jury plan precipitated an overflow meeting filled with concerned black citizens. Their petition opposing the Board's action was the largest presented on any subject in years. App. 7a-8a, 101a (¶ 108). Several citizens spoke in favor of the feasibility of drawing one or more majority-black districts, and no citizens spoke in favor of the Policy Jury plan that the Board proposed to adopt. *Id.* at 8a.

discriminatory reasons for adopting the Police Jury plan. That finding, too, was infected by the court's artificially restricted view of the relevant evidence, and was, in any event, clearly erroneous.

The court concluded that "guaranteed preclearance" was a legitimate, nondiscriminatory reason for the Board's adoption of the Police Jury plan. App. 28a. The fact that that plan had previously been precleared might perhaps have recommended the Police Jury plan over other districting plans comprised exclusively of majority-white districts. But the Board could not reasonably have believed that a plan that would honor traditional districting principles and improve the opportunity of black citizens to participate in the political process would have had less chance of preclearance than the Police Jury plan.[18] "Guaranteed preclearance" thus cannot explain why the Board preferred the Police Jury plan to the NAACP plan or any other plan providing an opportunity for black voters to elect a candidate of their choice. The court's finding that it did was clearly erroneous.

The district court also clearly erred in evaluating the specific "sequence of events" leading up to the adoption of the Police Jury plan. App. 33a; see *Arlington Heights*, 429 U.S. at 267. The court gave no weight to the fact that the Board hastened to adopt the Police Jury plan only after black voters presented a non-dilutive plan. The court's only explanation of that unusual action was to dismiss the NAACP proposal as not "plausible," because it "split 46 precincts." App. 33a. The court found that "the School Board entirely reasonably *could have*, when faced with the NAACP's plan, arrived quickly at the conclusion that zero precinct splits was significantly more desirable than 46." *Id.* at 29a (emphasis added). But

---

[18] The Police Jury plan disserved the School Board's traditional concerns by lopsidedly distributing the schools within the districts so that some Board members had no schools to represent, and by "wreak[ing] havoc with the incumbencies of four of the School Board members." App. 28a. The plan was thus much less

the correct focus in determining the purpose behind the adoption of the disputed plan is on the Board's *actual* purpose *at the time* it adopted that plan. *City of Pleasant Grove* v. *United States*, 479 U.S. 462, 470 (1987) (rejecting argument "developed after the fact" because it was "not the true basis" for decision). The evidence shows that the Police Jury plan split 13 existing precincts and created 20 new precincts. App. 85a (¶ 60), 88a-89a (¶ 70). The Board itself anticipated splitting precincts. *Id.* at 29a, 95a (¶ 89). There is no finding, nor even any suggestion in the record, that the Board ever considered the relative number of such splits, or their potential cost, as a factor in selecting the plan it adopted. And the Board never considered measures that could have reduced the number of precinct splits in the NAACP plan. *Id.* at 86a (¶ 62), 101a (¶ 106).[19]

---

plausible when adopted by the School Board than by the Police Jury. A plan that more evenly distributed schools among districts, and that also enhanced the political representation of black voters, could not reasonably have appeared to be a worse candidate for preclearance than the plan the Board submitted.

[19] The fact that the Board has proffered shifting justifications for its decision also supports a finding that it discriminated. *E.g.*, *Southwest Merchandising Corp.* v. *NLRB*, 53 F.3d 1334, 1344 (D.C. Cir. 1995); *EEOC* v. *Ethan Allen, Inc.*, 44 F.3d 116, 120 (2d Cir. 1994) (citing cases); cf. *St. Mary's Honor Center* v. *Hicks*, 113 S. Ct. 2742, 2749 (1993) ("The factfinder's disbelief of the reasons put forward by the defendant (particularly if * * * accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination."). As the district court noted, "[i]n the course of litigation, the School Board has offered several reasons for its adoption of the Police Jury plan that clearly were not real reasons," including that the Board sought to comply with this Court's decision in *Shaw* v. *Reno*, 113 S. Ct. 2816 (1993), which post-dated the Board's decision. App. 27a n.15. Other clearly pretextual reasons included the Board's stated desire to avoid "voter confusion" by adopting the same boundaries for the Police Jury and School Board districts. The voter-confusion rationale was raised for the first time *post hoc*, in the Board's Section 5 submission, and was not a genuine Board interest, given that Louisiana jurisdictions commonly have different School Board and Police Jury districts, and the Board had for more than a decade had districts different from the Police Jury's. See *id.* at 72a (¶ 22). Finally, although the Board had initially sought to redistrict in a manner that would protect incumbent Board members, it promptly abandoned that interest when faced with the proposal to draw one or more majority-black districts. *Id.* at 33a, 49a n.6, 73a (¶ 26).

3. a. The district court also erred in concluding that a non-retrogressive redistricting plan that clearly results in minority vote dilution in violation of Section 2 must be granted preclearance under Section 5. The Department of Justice regulations establishing procedures for the implementation of Section 5 provide that, even where a "submitted change is free of discriminatory purpose and retrogressive effect," the Attorney General nonetheless shall withhold preclearance where "a bar to implementation of the change is necessary to prevent a clear violation of amended section 2." 28 C.F.R. 51.55(b)(2). That regulation correctly interprets the Voting Rights Act, and should be sustained for purposes of both administrative and judicial Section 5 preclearance proceedings.[20]

All indicia of congressional intent show that, in amending Section 2 in 1982, Congress intended Section 2 and Section 5 to work together as provided in Section 51.55 (b)(2). The Senate Judiciary Committee Report on the amendments stated that Congress contemplated that a violation of amended Section 2 would preclude preclearance under Section 5: "In light of the amendment to section 2, *it is intended that a section 5 objection also follow if a new voting procedure itself so discriminates as to violate section 2.*" S. Rep. No. 417, 97th Cong., 2d Sess. 12 n.31 (1982) (emphasis added). The Senate

---

[20] The Department of Justice regulations authorize the Attorney General to deny preclearance only to prevent a "clear violation" of Section 2. 28 C.F.R. 51.55(b)(2). The undisputed evidence in this case established a clear Section 2 violation. The Court thus need not reach the question whether in judicial proceedings preclearance may also be denied where a Section 2 violation is present, but is less than clear.

Report is the "authoritative source" for construction of the 1982 amendments to the Voting Rights Act. *Thornburg* v. *Gingles*, 478 U.S. 30, 43 n.7 (1986).

When Congress amended Section 2, it did so against the backdrop of a principle it found articulated in *Beer* v. *United States*, 425 U.S. 130 (1976), that a voting practice free of discriminatory purpose or retrogressive effect under Section 5 nonetheless may not be precleared if it is illegally dilutive.[21] *Beer* announced that principle in terms of practices that were racially discriminatory in violation of the Constitution: The Senate Report quoted "the rule of *Beer*" that a voting change is objectionable if it "so discriminates on the basis of race or color as to violate the Constitution." S. Rep. No. 417, *supra*, at 12 n.31 (quoting 425 U.S. at 141). The Senate Report's reference to "the rule of *Beer*" in connection with its conclusion that preclearance should be denied based on a violation of amended Section 2, however, reflects Congress's assumption that, under that rule, a voting change that is dilutive in violation of Section 2 would also, even in the absence of any discriminatory purpose to dilute, not be precleared.

That assumption followed from the 1982 Congress's awareness that, at the time *Beer* was decided, both Section 2 and the Constitution were understood to employ the same standard for determining the existence of racial vote

[21] *Beer* held that Section 5's prohibition against voting changes with a discriminatory effect seeks principally "to insure that no voting-procedure changes [will] be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." 425 U.S. at 141. Accordingly, the Court held that a change that leaves racial minorities no worse off than they were before the change has no discriminatory effect for purposes of Section 5. But the Court went on to state that preclearance should nonetheless be denied to any voting change that "so discriminates on the basis of race or color as to violate the Constitution." *Ibid.* The Court specifically cited the vote-dilution cases as examples of discrimination that could be reached under Section 5. *Id.* at 142 n.13.

dilution.[22] As a result of *Bolden* and the 1982 amendment of Section 2, however, the constitutional and statutory standards diverged.[23] Acting in 1982, after the *Bolden* decision, Congress believed that that divergence should not alter the applicability of the sound general principle that illegally dilutive voting practices should not be precleared under Section 5. Having amended the Voting Rights Act to reestablish that voting practices that even unintentionally result in vote dilution constitute discrimination in violation of Section 2, Congress contemplated that voting changes that violate Section 2 would not be precleared.

Congressional oversight hearings in 1985 further confirm that Section 51.55(b)(2) accurately implements congressional intent. In May, 1985, the Attorney General issued

[22] S. Rep. No. 417, *supra*, at 18-19 & n.59; see also *Chisom* v. *Roemer*, 501 U.S. 380, 392 (1961) ("At the time of the passage of the Voting Rights Act of 1965, § 2 * * * was viewed largely as a restatement of the Fifteenth Amendment."); *Bolden*, 446 U.S. at 60-61 ("the sparse legislative history of § 2 makes clear that it was intended to have an effect no different from that of the Fifteenth Amendment itself").

[23] *Bolden* held that proof of discriminatory intent is necessary to establish unlawful vote dilution under Section 2 or the Constitution. It was in response to *Bolden* that Congress in 1982 amended Section 2. See generally S. Rep. No. 417, *supra*, at 15-16. Concluding that *Bolden*'s intent test put plaintiffs to an inordinately difficult burden of proving unlawful dilution, Congress codified in amended Section 2 the "results" test originally set forth in *White* v. *Regester*, 412 U.S. 755 (1973). See *Gingles*, 478 U.S. at 43-44. Section 2 now prohibits any practice "which results in a denial or abridgement" of the right to vote on the basis of race or color. 42 U.S.C. 1973(a). Tracking the language of *White*, 412 U.S. at 766, Section 2 provides that a violation will be established if "the political processes leading to nomination or election * * * are not equally open to participation by members of a [protected class] in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. 1973(b). The 1982 amendments also extended Section 5's preclearance requirement, which was due to expire on August 8, 1982. 42 U.S.C. 1973b(a)(8).

his proposed Section 5 regulations. See 50 Fed. Reg. 49,122. Although the wording differed to some extent from the final provision, the proposed regulations provided that the Attorney General would object to voting changes in the case of a clear violation of Section 2. *Id.* at 19,131 (proposed 28 C.F.R. 51.56(c)(1)). Congress then held oversight hearings on the proposed regulations, and acquiesced in the Attorney General's approach.[24] At the oversight hearings, the Assistant Attorney General for the Civil Rights Division of the Department of Justice testified in detail that under the proposed regulations Section 5 objections might be based on clear Section 2 violations.[25] Congress's failure to alter the enforcing agency's policy, after full review of that policy, "make[s] out an unusually strong case of legislative acquiescence in and ratification by implication of" the agency's position. *Bob Jones Univ.* v. *United States*, 461 U.S. 574, 599 (1983).

b. The district court erred in relying on the difference between the meaning of "result" in Section 2 and "effect" in Section 5, and in thus concluding that the statutory text "unambiguous[ly]" rejected the principle that Section 5 preclearance can be denied based on a Section 2 violation. App. 17a. The principle that preclearance should not be granted to voting changes that would clearly violate Section 2 does not depend on reading those two terms to have the same meaning. Rather, as the regulation provides, even where a voting change *meets* Section 5's nondiscriminatory-purpose and non-retrogression criteria, neither the Attorney General nor the court should be required to sanction it and permit it to be implemented if

---

[24] See *Proposed Changes to Regulations Governing Section 5 of the Voting Rights Act: Oversight Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 99th Cong., 1st Sess. (1985) [hereinafter *Oversight Hearings*].

[25] See *Oversight Hearings* 149, 150-152 (statement of Wm. Bradford Reynolds).

it is clearly unlawfully dilutive. Nothing in the text of the Voting Rights Act speaks to that issue, and the legislative history uniformly supports the Attorney General's view.

The district court also noted that the allocation of the burden of proof differs under Section 5 and Section 2, and suggested that it would be inappropriate to require a covered jurisdiction to disprove a Section 2 violation in order to obtain Section 5 preclearance. App. 16a. We agree that, under Section 5, the covered jurisdiction bears only the burden of proving the absence of both a retrogressive effect and a discriminatory purpose. The Department of Justice regulation permits a clear Section 2 violation to be raised as an affirmative defense against preclearance, upon which the United States, not the covered jurisdiction, would bear the burden of proof. If the regulation is applied to judicial preclearance proceedings, the United States would bear at least the same burden of proof in interposing a Section 2 violation as a defense as it would bear as a plaintiff in Section 2 litigation.

CONCLUSION

The Court should note probable jurisdiction.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

DEVAL L. PATRICK
Assistant Attorney General

PAUL BENDER
Deputy Solicitor General

CORNELIA T.L. PILLARD
Assistant to the Solicitor General

DAVID K. FLYNN
EILEEN PENNER
Attorneys

MARCH 1996

☆ U. S. GOVERNMENT PRINTING OFFICE: 1996 405017 40084